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IN THE

Supreme Court of the United States

OCTOBER TERM 1947.

No. 196

AARON L. BILTCHIK and FLORENCE W. BRILL, individually and as holders of Class B Debentures of Green Bay and Western Railroad Company, suing on behalf of themselves and all other holders of said Debentures who may be similarly situated,

Petitioners,

against

GREEN BAY & WESTERN RAILROAD COMPANY, a Wisconsin Corporation, and C. LEDYARD BLAIR, CHARLES W. COX, ROBERT WINTHROP, H. E. McGEE and RICHARD B. WILSON,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Opinions Below.

The opinion of the Circuit Court of Brown County, Wisconsin, is not reported. It is printed in the record at page 1.

The opinion of the Supreme Court of Wisconsin is printed in the record at page 185 and is reported in 250 Wis. 177 and 26 N. W. 2d 633.

Statement of the Case.

The respondents do not subscribe to the statement of the case, as set forth in the petition herein, nor to the arguments of petitioners improperly incorporated therein.

This action, a representative action for all holders of Class B Debentures, was brought by the petitioners in the Circuit Court of Brown County, Wisconsin, to seek an interpretation, under Wisconsin law, of the language of the Class B Debentures, which, without permitting discretion to be exercised by the Directors, petitioners claimed would force the defendant Railroad Company to pay to the holders of Class B Debentures all surplus earnings for each year during the past twenty years, after annually paying to the holders of the Common Stock and of the Class A Debentures, five per cent of the base amount thereof. The amount claimed would amount to more than $1,000,000.

The respondents' construction of the language of the Debentures, upheld by the Courts below, is that the Directors of the defendant Railroad Company were vested with discretion in the distribution of such net income such as ordinarily is exercised with respect to the payment of dividends. In the exercise of such discretion, the Directors authorized the payment of more than $1,300,000 thereof to the holders of the said Class B Debentures (R. 13) and approved the expenditure of more than $2,000,000 thereof for betterments and improvements of the railroad. It is not disputed that such expenditures were necessary to meet competition and to enable the railroad to continue as a going concern (R. 8, 32). The expenditures also inured to the benefit of the said Class B Debenture holders in that their equity was increased by more than $2,000,000 (R. 8).

The uncontradicted proof established that the Class B Debentures were issued in 1896, pursuant to a plan of reorganization following foreclosure, and that no cash was paid for them and that they were delivered in exchange for second mortgage bonds and common and preferred stock of the old company (R. 7).

The Court below, the Supreme Court of Wisconsin, referring to the said foreclosure action said:

> "* * * It is clear from the undisputed evidence that had the foreclosure suit proceeded in the common course of practice to sale of the mortgaged property neither the holders of the second mortgage bonds nor the stockholders of the old company would have received anything. The scheme of reorganization was manifestly planned to assure that the holders of the subordinate securities should receive nothing whatever until the holders of the new Class A Debentures and the new stock were compensated both through current income and on liquidation of the new corporation, and this must be borne in mind in construing the provisions of the Class B Debentures on which the suit is based" (R. 187).

POINT I.

This Court has no jurisdiction of this cause in that no federal question was presented to or decided by the Court below, the Supreme Court of Wisconsin.

A. This Court has held that the decision of a federal question by the Court below is a jurisdictional requirement.

In the leading case of *Lynch* v. *New York, ex rel. Pierson,* 293 U. S. 52, this Court held that the essential elements of this Court's jurisdiction are as follows:

> 1. That a federal question was presented for decision to the Court below.
>
> 2. That the decision of such question was necessary to the determination of the cause.
>
> 3. That such federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

We quote the relevant portion of the opinion in that case, delivered by the former Chief Justice, Mr. Justice Hughes, viz.:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (Citing cases.)

The said case was quoted and followed in the case of *Radio Station WOW, Inc. et al.* v. *Johnson,* 326 U. S. 120, at page 129. The opinion therein was delivered by Mr. Justice Frankfurter.

See also *Honeyman* v. *Hanan,* 300 U. S. 14, 18.

B. The decision of the Court below involved no federal question. It was confined to a construction of the Class B Debentures.

A reading of the decision of the Court below (R. 185) readily demonstrates that no federal question was involved. The Court construed the contract, the Class B Debenture. It quoted a covenant, contained in the Debenture (R. 187), and further stated, viz.:

> "Not only this provision but two other provisions of the Class B Debentures must be considered."

The Court then proceeded to analyze those provisions and reached the conclusion that the language of the Debentures be construed as vesting the directors with discretion in distributing the earnings of the Railroad Company.

The decision is in the same category as thousands of cases in the courts of this country, construing contracts and ascertaining the intent of the parties.

No federal question and, in fact, no question was decided by the Wisconsin Court other than the construction of the Class B Debentures.

The petitioners argue that the fifth and last defense in respondents' answers (R. 19, 21) raised a federal question. On the contrary, the respondents alleged, in substance, that they were engaged in the transportation business and that all available income was necessarily expended in perfecting the equipment for the proper service of the Railroad's customers, the public. The testimony of Mr. McGee

the President of the Railroad Company, to that effect, was not disputed (R. 32). The opinion of the Trial Judge (R. 4) and the opinion of the Wisconsin Supreme Court (R. 189), state that the testimony was not disputed. The finding of fact on this point (R. 8), is as follows, viz:

> "12. That all of the income of the defendant corporation for the years 1924 to 1944 inclusive, other than the sums paid to the security holders, was used and necessarily used in the public interest for additions and for the betterment for the defendant's railroad and to properly and adequately serve the public, to meet competition and in the best interest of the security holders."

It is obvious that no federal question was involved.

C. If the decision of the Court below rested upon a non-federal question and a federal question and its does not appear upon which ground the judgment was based, this Court will not take jurisdiction.

If the Supreme Court of Wisconsin determined not only a construction of the Class B Debentures under Wisconsin law but also determined a federal question, this Court will not take jurisdiction, under the authority of *Lynch* v. *New York, ex rel. Pierson, supra,* wherein this Court said, p. 54:

> "* * * Where the judgment of the State Court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

The case of *Fox Film Corp.* v. *Muller,* 296 U. S. 207, is particularly in point. The action pertained to the construc-

tion of a contract, the same issue involved in the instant case. The defendant set up the invalidity of the contract under the Sherman Anti-Trust Act. The court at page 211 said:

> "* * * The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts, and the federal question in respect of their validity under the Anti-trust Act, were clearly independent of one another. See *Allen* v. *Southern Pacific R. Co.*, 173 U. S. 479, 489-492. The case, in effect, was disposed of before the federal question said to be invloved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear."

The petitioners have failed to conform to and comply with the decisions of this Court setting forth the essentials of jurisdiction on certiorari.

POINT II.

Six Courts have construed the Class B Debentures and they have all interpreted the said debentures as vesting the directors with discretion.

Those decisions are as follows, viz.:

1. *Green Bay and Western Railroad Company* v. *Commissioner of Internal Revenue*, 3 T. C. 372 (1944).

2. *Green Bay and Western Railroad Company* v. *Commissioner of Internal Revenue,* 147 Fed. (2d) 585 (C. C. A. 7th—1945).

3. *Williams* v. *Green Bay & Western Railroad Company,* 147 Fed. (2d) 777 (C. C. A. 2d—1945).

4. *Williams* v. *Green Bay & Western Railroad Company,* 68 Fed. Supp. 509 (U. S. D. C. Southern District of N. Y.).

5. *Biltchik* v. *Green Bay & Western Railroad Company,* Circuit Court of Brown County, Wisconsin. The decision is unreported. It is printed in the Record at page 1.

6. *Biltchik* v. *Green Bay & Western Railroad Company,* 250 Wis. 177, 26 N. W. 2nd 633.

POINT III.

The petition for a writ of certiorari to this Court should be denied.

Respectfully submitted,

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